No. 95-1387

(2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,

Petitioner,

vs.

WEST SIDE DITCH COMPANY, a Montana Corporation; CITY OF DEER LODGE; RONALD KELLY; JERRY RUTLEDGE; CHARLES BECK; RICHARD FORSON; GEORGE REISTAD; THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; THOMAS A. BECK; MELVIN R. BECK; ROBERT EVANS,

Respondents.

On Petition for Wit of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the doctrine of complete federal pre-emption, when the issue of pre-emption was not raised by the Petitioner on appeal, and was not discussed by the appellate court in its opinion.

2. Whether the Respondents' state law-based claims for monetary damages constitute a "challenge," or an effort to "review" an EPA order within the meaning of CERCLA § 9613(h), when the EPA has concluded that Respondents' claims are not a "challenge" or an effort to "review" its cleanup orders.

PARTIES TO THE PROCEEDINGS

The list of parties described in Petitioner's brief is correct.

As required by Supreme Court Rule 29.6, Respondent West Side Ditch Company states that it does not have a parent company, or any subsidiaries or affiliates.

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STATEMENT OF THE CASE

The doctrine of complete pre-emption was not raised by the Petitioner during the appeals process in the Ninth Circuit, and was not discussed in the Ninth Circuit's opinion. Petitioner's assertion that this case presents a "significant and recurring issue under the doctrine of complete pre-emption" is incorrect.

The Ninth Circuit ruled that under 42 U.S.C. § 9613(h), Respondents' state law-based water law and tort claims are not a "challenge" to a "removal or remedial action" or an attempt "to review any order" issued by the United States Environmental Protection Agency (EPA). Petitioners ask that the Ninth Circuit's ruling be overturned.

A. Factual Background

West Side Ditch Company is a Montana Corporation organized to provide irrigation water to ranchers along the Clark Fork River. The individual plaintiffs in these two actions are shareholders of the corporation or persons entitled to receive water from the Clark Fork River.[1]

ARCO operates a series of tailings ponds (Warm Springs Ponds) located above Respondents' diversions on the Clark Fork River. In 1985 ARCO sold its historic water rights in the Warm Springs Ponds, thereby depriving itself of any further right to the use of water out of the Clark Fork River. After selling its rights, ARCO continued diverting water from the Clark Fork River and its tributaries illegally, which diminished flows in the Clark Fork River at the Respondents' headgates, and caused damage to their crops.

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1. The plaintiffs will be referred to collectively as West Side water users.

After several unsuccessful requests that ARCO cease its illegal diversions, West Side filed suit in December of 1990 in state district court. The West Side water users alleged that ARCO had interfered with their water rights resulting in crop losses and economic damages. Respondents' Appendix B, pp. 14a, 15a, 17a; Appendix D, pp. 31a, 32a, 33a.

West Side's request for monetary damages is based on statutory and common law principles which form the prior appropriation doctrine. Among these principles is a requirement that:

> a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department.

Mont. Code Ann. § 85-2-302.

The term "appropriate" means to divert, impound or withdraw (including by stock for stockwater) a quantity of water. Mont. Code Ann. § 85-2-102. Water may only be "appropriated" for a "beneficial use." Mont. Code Ann. § 85-2-301. A "beneficial use" is defined as:

> a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stockwater), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.

Mont. Code Ann. § 85-2-102(2)(a).

Of primary importance to West Side is the rule that senior water rights have priority over junior water rights, and that junior water users who divert water out of priority are liable for the damages caused by their diversion. *Atchison v. Peterson*, 87 U.S. 507 (1874); *Quigley v. Birdseye*, 11 Mont. 439, 28 P. 741 (1892).

After removal to federal court, ARCO moved to dismiss West Side's claims, asserting that it was acting pursuant to orders issued by the EPA and that 42 U.S.C. § 9613(h) required dismissal of any claim which was a challenge to cleanup efforts in the basin. ARCO further argued that West Side's complaint actually stated a claim for inverse condemnation against the United States because ARCO's diversion of water was made pursuant to orders issued by the EPA.

The EPA had little sympathy for ARCO's assertion that it was entitled to harm downstream water users under the auspices of CERCLA. In orders issued *after* West Side's action was filed, the EPA required ARCO to follow Montana water law as part of its cleanup efforts, and recognized the right of an injured water user to proceed against ARCO for damages under state tort law. This intent is driven home by the Administrative Order for Remedial Design/Remedial Action issued on June 17, 1993:

> Nothing in this Unilateral Administrative Order shall alter any obligation Respondent may have under state law to provide compensation or payment for the use of water.

Appendix Ex. G; CR 148, Exhibit C, Administrative Order for Remedial Design/Remedial Action, page 26.

An October 16, 1991 letter from the EPA Superfund Branch Chief stated that:

> to protect water rights as stated in Montana's codes and administrative rules . . . ARCO is required to assure that water rights are not adversely affected by its action.

Appendix Ex. K; CR 148, Exhibit F.

ARCO failed to obtain water rights necessary for diversion and usage of water in the Clark Fork Basin, and continued to make out-of-priority diversions of water which depleted the supply of water available to West Side water users. *See generally* Appendix Ex. L; CR 162.

The EPA has never authorized out-of-priority diversions by ARCO. Nevertheless, ARCO has diverted water repeatedly, even though it owns no water rights senior to those held by West Side water users. The West Side water users have been significantly damaged by these out-of-priority diversions.

B. Proceedings Below

1. *Federal District Court Proceedings*

In December 1993, the United States District Court dismissed the injunctive relief portion of the West Side Ditch Company complaint on the grounds that 42 U.S.C. § 9613 precluded any challenges to an EPA cleanup activity. Petitioner's Appendix D, p. 16a. The district court also dismissed West Side's claims for monetary damages on the grounds that the complaint alleged a taking of water rights and that such an action would only lie against the United States under the Tucker Act, 28 U.S.C. § 1491. Petitioner's Appendix D, p. 17a.

West Side Ditch Company *et al.*, and Beck *et al.* appealed the dismissal of their monetary damages claims to the Ninth Circuit

court of appeals. West Side Ditch Company did not appeal the dismissal of its request for injunctive relief.

2. *Ninth Circuit Proceedings*

The Ninth Circuit Court of Appeals reversed the district court's decision to dismiss the plaintiffs' compensatory and punitive damages claims. Respondents' Appendix A, pp. 8a, 9a. The court found that the plaintiffs had "expressly allege[d] a cause of action based purely on state law." Respondents' Appendix A, p. 7a. Based on this finding, the court concluded that the plaintiffs had not stated a claim for inverse condemnation against the United States. Respondents' Appendix A, pp. 8a, 9a.

The appellate court also ruled that "Plaintiffs' damage claim does not 'challenge' the CERCLA cleanup plan and is thus unaffected by CERCLA's provision limiting such challenges." Respondents' Appendix A, p. 8a. The appellate court observed that if the plaintiffs prevail on their state law compensatory damages claims, "the remedy would be financial compensation for lost crops and lost profits. Such a remedy would not interfere with ARCO's implementation of the cleanup." *Id.* at 8a, 9a.

The Petitioner asserts that the appeals court "overlooked the text of Section 9613(h) ... and did not consider the consequences [that its decision] might have for the analysis of federal subject matter jurisdiction." Petitioners' Brief at 12. Contrary to Petitioner's assertion, the appellate court cited § 9613(h) directly as support for its conclusion that "Plaintiffs' damage claim does not 'challenge' the CERCLA cleanup plan." *Id.*

Next, the Petitioner contends that the appellate court did not recognize that § 9613(h) "withdraws jurisdiction to review any

challenges to removal or remedial action." Petitioner's Brief at 12. Again, this statement mischaracterizes the appellate court's action. The court expressly found that the Respondents' claims were not a "challenge" within the meaning of 42 U.S.C. § 9613(h), thereby obviating the need for a discussion of jurisdiction.

Respondents do not contest the Ninth Circuit's order dismissing its request for injunctive relief.

REASONS FOR DENYING THE WRIT

The issue of federal pre-emption was not raised by the Petitioner on appeal in the Ninth Circuit, and no discussion of pre-emption occurred in the appellate court's decision. Even assuming that other circuit courts have applied the doctrine of pre-emption erratically, a meaningful analysis of pre-emption cannot occur in this case.

Petitioner also argues that this case raises an issue regarding what claims constitute challenges to response actions under § 9613(h). Such an inquiry is necessarily factual. "[A] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rules of the Supreme Court, Rule 10(c). If this Court decides to make a factual inquiry, it should be aware of the EPA's repeated pronouncements that the Respondents' complaint is not a "challenge" to EPA cleanup efforts, and the Ninth Circuit court's finding that no "challenge" exists because "ARCO could comply with the [EPA's] order by buying storage water or senior water rights from others." Respondents' Appendix A, p. 8a, n. 6.

The EPA does not share Petitioner's belief that "the Ninth Circuit's decision has enormous consequences for the effective

administration and enforcement of CERCLA." Petitioner's Brief at 14. The EPA has supported the Respondents' right to bring claims for monetary damages against the Petitioner at each step of this litigation. If the Respondents' claims for monetary damages were likely to have the "enormous consequences" suggested by the Petitioner, then the EPA would have opposed those claims from the outset. The EPA's support of the Respondents' state law claims sharply contradicts the Petitioner's assertion that this case has nationwide implications for the Superfund program.

I.

PRE-EMPTION

1. The Petitioner argues that this Court should grant certiorari in a case which does not discuss pre-emption, in order to resolve conflicts relating to pre-emption allegedly existing in other courts of appeal. None of the cases cited by the Petitioner discuss application of the complete pre-emption doctrine to CERCLA.

Petitioner's bid for certiorari is based on a footnote in the Ninth Circuit's opinion which states that "plaintiff may avoid federal court by relying exclusively on state law even if defendant asserts a federal defense." Respondents' Appendix A, p. 8a, n.7. The Petitioner contends that this brief reference to the well pleaded complaint rule justifies a comprehensive review of the pre-emption doctrine.

Federal courts acquire jurisdiction under Article III of the Constitution, and under 28 U.S.C. § 1331, which provides "that the district court shall have . . . jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States." Civil actions which are brought in state court, but which

"arise under" federal law, "may be removed by the defendant . . . to the district court of the United States." 28 U.S.C. § 1441. Thus, "only state court actions that originally could have been filed in federal court may be removed to federal court." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

The test used to differentiate between state court actions that involve federal questions, and those that do not, is the well pleaded complaint rule. The well pleaded complaint rule "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392. "As a practical matter," the well pleaded complaint rule "severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court, thereby avoiding more or less automatically a number of potentially serious federal/state conflicts." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8, 88 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)

The existence of federal issues in a state law-based case does not indicate that federal courts have jurisdiction over a dispute. "It is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiffs' complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. at 393 (emphasis supplied in the original).

An infrequently employed corollary of the well pleaded complaint rule is the doctrine of complete pre-emption, which holds that federal courts have jurisdiction in circumstances where the pre-emptive force of a federal statute "is so powerful as to displace entirely any state cause of action." *Franchise Tax Board* at 23. Such pre-emption occurs when Congress has "so

completely pre-empt[ed] a particular area, that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 63, 64 (1987).

This Court has applied the complete pre-emption doctrine with caution. "We have consistently emphasized that, in exploring the outer reaches of section 1331, determinations about federal jurisdiction require sensitive judgments about Congressional intent, judicial power, and the federal system." *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804, 811, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986). Such decisions are necessarily "close . . . in the absence of explicit direction from Congress." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 63. "Pre-emption should not be lightly inferred." *Lingle v. Norge,* 486 U.S. 399, 413 (1988), citing *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 21 (1987).

2. Although the doctrine of complete pre-emption was not discussed in the Ninth Circuit, Petitioner contends that this case merits issuance of a writ of certiorari to discuss application of the complete pre-emption doctrine. The cases cited by Petitioner to support this contention do not discuss CERCLA.

The Petitioner compares *Rice v. Panchal,* 65 F.3d 637 (7th Cir. 1995), a case involving ERISA, with the decisions of other circuit courts involving ERISA, as evidence that the doctrine of pre-emption is being applied unevenly. Like other circuits, the court in *Rice v. Panchal* noted that "the foundation for removal is the creation of federal law to replace state law." 65 F.3d at 641, citing *Bartholet v. Reishauer A. G. (Zurich),* 953 F.2d 1073, 1075 (7th Cir. 1992). Petitioner contends that *Rice v. Panchal* is unique because it holds that complete federal pre-emption of state law can occur even though federal substantive law does not precisely mirror the state law it replaces. This concept is hardly

novel, given that the same rationale was used in *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58 (1987), where this Court held that plaintiffs' common-law contract and tort claims were pre-empted by § 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, even though § 502 did not supply the plaintiffs with an identical cause of action.

Aaron v. National Union Fire Ins. Co. of Pittsburgh, 876 F.2d 1157 (5th Cir. 1989), also contradicts Petitioners' theory that the circuits are in disarray. In *Aaron,* the court found that complete federal pre-emption did not exist because plaintiffs could not have pleaded a cause of action under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 900 *et seq.* that would have replaced otherwise available state causes of action. Nowhere in *Aaron* is there any statement that complete federal pre-emption depends on the existence of a federal cause of action identical to the state cause of action it is replacing.

The standard used in *Aaron* was whether Congress intended to "completely pre-empt a field of state law." *Aaron* at 1161.

The *Aaron* court was careful to distinguish between ordinary pre-emption, which occurs when federal law simply bars a state claim without supplying an alternate remedy, and complete federal pre-emption, which occurs when federal law completely bars the state claim and supplies an alternate, although not necessarily identical, federal remedy. *Aaron* at 1165.

The difference between ordinary and complete pre-emption was also emphasized in *Warner v. Ford Motor Company,* 46 F.3d 531 (6th Cir. 1995), another case under ERISA. The *Warner* court noted that " ordinary pre-emption" and the complete pre-emption giving rise to removal jurisdiction are two distinct concepts. "The fact that . . . a plaintiff's claims are pre-empted

does not establish that they are removable to federal court." *Id.* at 535 citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398, 96 L. Ed. 2d 318, 107 S. Ct. 2425, 2432 (1987).

3. Petitioner argues that the Ninth Circuit could have held that § 9659(a)(1) of CERCLA "provides a federal cause of action vindicating the very interests that [the Respondents'] state law claims seek to protect." Petitioner's Brief at 15. The Ninth Circuit could not have reached this conclusion because the Respondents', as masters of their complaint, did not ask for relief under § 9659(a)(1).

The Petitioner attempts to characterize this lawsuit as a § 9659(a)(1) action by inserting new facts and legal theories into the complaint. This approach got short shrift in *Caterpillar* when the defendant "impermissibly attempt[ed] to create the prerequisites to removal by ignoring the set of facts ... presented by respondents, along with their legal characterization of those facts, and arguing that there are different facts which Respondents might have alleged that would have constituted a federal claim." 482 U.S. at 397.

The Petitioner's "attempt to justify removal on the basis of facts not alleged in the Complaint" should be rejected now, as it was in *Caterpillar, id.*

The Court's approach in *Caterpillar* is not new, for it has long been established that the well pleaded complaint rule "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar* at 392, citing *See the Fair v. Kohler Dye & Speciality Company*, 228 U.S. 22, 25, 57 L. Ed. 716, 33 S. Ct. 410 (1913).

The savings clause contained in 42 U.S.C. § 9659(h) protects the Respondents' right to assert a state law cause of

action. Respondents' decision not to base their complaint on federal law does not create federal pre-emption.[2]

The Petitioner also argues that Congress intended to pre-empt state law by enacting § 9659(h), which provides that "this chapter does not affect or otherwise impair the rights of any person under federal, state, or common law, except with respect to the timing of review as provided in § 9613(h) of this title. . . ." The plain meaning of § 9659(h) is that Congress did not wish to disturb the wide array of federal, state, and common law claims which exist outside of CERCLA.

The only limitation contained in § 9659(h) is a reference to the timing of review provisions contained in § 9613(h). ARCO contends that these timing of review provisions replace state statutory and common law causes of actions with a federal cause of action, thereby causing complete pre-emption. In making this contention, Petitioner confuses the timing of review provisions of § 9613(h) with the doctrine of complete pre-emption.

Complete federal pre-emption occurs when Congress seeks to dominate a particular area of law. *See Caterpillar,* 482 U.S. at 386. Ordinary pre-emption occurs when federal law simply bars a state claim without replacing it with an alternate federal remedy. "A state court action does not 'arise under' an act of Congress . . . even though expressly 'prohibited thereby.' " *Gully v. First National Bank,* 299 U.S. 109, 116, 81 L. Ed. 2d 70, 57 S. Ct. 96 (1936). Although state law claims which "challenge" a CERCLA cleanup are barred by the timing of review provisions of § 9613(h), this is not the same as asserting that Congress

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2. Although Petitioners contend that § 9659(a)(1) would satisfy the complete pre- emption test adopted by the Third, Fifth, and Sixth Circuits, it does not supply any evidence which indicates that Congress, by adopting § 9659(a)(1) intended to completely pre-empt state tort law.

enacted § 9613(h) to dominate the field of state tort law, thereby giving rise to complete federal pre-emption and subjecting such claims to federal removal jurisdiction.

The Petitioner erroneously contends that § 9659(h) would have satisfied the pre-emption standard articulated in *Rice v. Panchal* and *Deford v. Soo Line.* In *Rice v. Panchal,* the court emphasized that "the foundation for removal is the creation of federal law to replace state law." *Rice* at 641 citing *Bartholet* at 1075. The *Rice* court asked whether Congress wanted "federal courts to create a federal common law." *Id.* Because § 9613(h) does not create a new federal cause of action, it does not fall within the scope of the complete pre-emption analysis used in *Rice v. Panchal.*

Similarly, Petitioner contends that the Court in *Deford v. Soo Line R. Co.,* 867 F.2d 1080 (8th Cir. 1989), would have found that pre-emption existed in § 9659(h). Petitioner's Brief at 16. The *Deford* court held that complete federal pre-emption occurs only when Congress "so pervasively occup[ies] the field . . that a competing state law claim necessarily invokes federal law." *Id.* 1084, 1085. The issue in *Deford* was complete pre-emption of state law claims by the Railway Labor Act (RLA). According to the *Deford* court, the "statutory grievance procedures under the RLA are the mandatory and exclusive federal remedy for resolving minor disputes. Congress considered it essential to keep these so-called minor disputes within the National Railroad Adjustment Board and *out of the courts.*" *Id.* at 1085, citing *Union Pacific R. v. Sheehan,* 439 U.S. 89, 94 L. Ed. 2d 354, 99 S. Ct. 399, 402-58 (1978) (emphasis supplied in original). The striking evidence of congressional intent to pre-empt state law expressed in the RLA is not present in § 9613(h).

4. Petitioner also argues that certiorari should issue because of an alleged disagreement between the Third and

Eighth Circuits about Congressional intent regarding the Railway Labor Act. Petitioner implies that the Third Circuit court in *Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R. Co.*, 858 F.2d 936 (3d Cir. 1988) used a different standard of analysis than the Eighth Circuit court in *Deford v. Soo Line R. Co.*, 867 F.2d 1086 (8th Cir.), *cert. denied*, 492 U.S. 927 (1989). The Petitioner argues that the Third Circuit's test required "affirmative evidence in the [federal statute] or its legislative history that Congress intended state claims of this kind to be removable," Petitioner's Brief at 17 citing *Railway Labor*, 858 F.2d at 942, whereas, the Eighth Circuit somehow expanded this test by inquiring about "the history and purpose of the statute" and by comparing the RLA to "analogous statutes with complete pre-emptive powers." Petitioner's Brief at 17, citing *Deford*, 867 F.2d at 1086. In making this distinction, the Petitioner overlooks *Railway Labor's* careful comparison of the RLA with § 502(a) of ERISA. Although the *Railway Labor* and *Deford* courts ultimately reached different conclusions on the same issue, they used the same methods of analysis.

Granting certiorari in the instant case will not help resolve an alleged problem of congressional intent regarding the Railway Labor Act.

Petitioner contends, that by enacting § 9659(h), Congress intended for state law claims to be removable to federal court. Analysis of the Petitioner's argument necessarily begins with a review of the statute itself. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987). Section 9659(h) reads:

> This chapter does not affect or otherwise impair the rights of any person under federal, state, or common law, except with respect to the timing of review as provided in 9613(h) . . .

The question to be answered is whether the pre-emptive force of § 9659(h) "is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim' . . . ." *Caterpillar,* 482 U.S. at 493.

Section 9659(h) is a savings clause which consists of two parts. The plain language of the first part expressly preserves the right of "any person" to pursue a "Federal, State, or common law" cause of action.

The second portion of § 9659(h) references the timing of review provisions contained in § 9613(h). The timing of review constraints contained in § 9613(h) also fall into two categories. The first includes "challenges to removal or remedial action[s]"; while the second addresses actions brought "to review any order issued under § 9606(a) of" CERCLA.

Petitioner contends that the "federal, state, or common law" causes of action which Congress sought to protect under § 9659(h) are completely pre-empted by the language of § 9613(h), thereby making all federal, state, or common law claims removable to federal court.

The plain language of § 9613(h) suggests a different result. By its terms, § 9613(h) seeks only to preclude state law based claims which "challenge" removal or remedial actions, or "review" orders issued by the EPA under § 9606(a). State law-based claims which do not fit either category remain unaffected.

Congressional intent to pre-empt may be gleaned from legislative history if a statute is ambiguous. Although § 9613(h) is clear, Petitioner engages in an extensive discussion of legislative history in an effort to demonstrate pre-emptive intent. Contrary to Petitioner's assertion that § 9613(h) blocks all claims, Congress enacted § 9613(h) to:

> ensure that Government and private cleanup resources will be directed toward mitigation, not litigation. The section is designed to preclude piecemeal review and excessive delay of cleanup.

Comments of Senator Thurmond, Cong. Rec. S28441 (daily ed. Oct. 3, 1986).

Congress wanted to protect EPA from litigation brought to review EPA's cleanup proposals, or to challenge the EPA's remedy selection. Actions which do not distract EPA from its cleanup objectives are outside the scope of § 9613(h).

Representative Glickman's comments about the first paragraph of § 9613(h) are also noteworthy. "The [r]eference [to 28 U.S.C. 1332] was made to ensure that actions in State court under State law can continue to be brought in Federal court if diversity jurisdiction exists." Cong. Rec. H29735 (Oct. 8, 1986) (Rep. Glickman). These comments show an express intent to allow state law causes of action to be brought in federal court if diversity jurisdiction exists. By implication, Congress also intended that state law causes of action could be filed in state court if diversity jurisdiction *does not* exist, or if the plaintiff selected a state court forum.

Finally, the Congressional Record contains an explicit statement that the Superfund statute was not intended to pre-empt other law. "The Comprehensive Environmental Response Compensation and Liability Act [CERCLA] does not provide for pre-emption of any legally applicable requirement established under any other Federal or State law." Cong. Rec. S14915 (Oct. 3, 1986). This comment is consistent with the EPA's pronouncements concerning the remedy available to the Respondents in the instant case.

> Plaintiffs' claims for relief seek a declaration of water rights, consequential damages, and punitive damages. To the extent that these claims do not challenge or seek to block the response action at the Warm Springs ponds operable unit, they do not appear to implicate CERCLA. [I]f in fact, Plaintiffs' water rights have been impaired, CERCLA does not bar a remedy *unless* that remedy would involve review of the propriety of or possible injunction against, the performance of an ongoing CERCLA response action.

CR 101 at 17 and 18 (emphasis added). Respondents' damages claims do not go to the propriety of, nor do they seek injunction against, any response action.

Petitioner supplies a number of citations to the Congressional Record which it contends demonstrate intent to completely pre-empt state water and tort laws.[3] Careful review

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3. There is a long history of federal deference to state water law. The Mining Act of 1866, 14 Stat. 251 (1866), 43 U.S.C. § 661 (1870), states that "[W]henever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the court, the possessors and owners of such vested rights shall be maintained and protected in the same." Section 9, 14 Stat. 253. *See also*, the Desert Land Act of 1877. 19 Stat. 377 (1877), as amended, 43 U.S.C. § 321 (1970). The Reclamation Act of 1902 provides that "[N]othing in this Act shall be construed as effecting to intended to effect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder . . ." 32 Stat. 390.

The Wallop Amendment to the Clean Water Act unequivocally reaffirmed congressional deference to state water law:

(Cont'd)

of these citations shows that they are limited to actions which seek pre-enforcement review of response actions, or administrative orders. Such actions necessarily require the EPA to expend its resources on litigation. Because the instant case does not seek review of EPA orders, and does not name EPA as a party, it does not fall within the body of claims which Congress wanted to forestall by enacting § 9613(h).

5. The Petitioner argues that the Ninth Circuit's decision conflicts with this Court's decisions regarding the complete pre-emption doctrine because claims which fall within the scope of § 9659(a)(1) are pre-empted. Because, the Respondents did not file an action under § 9659(a)(1), a discussion of the pre-emptive force of this statute is irrelevant.

Next, Petitioner argues that the Ninth Circuit's failure to

(Cont'd)

> It is the policy of Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state.

Clean Water Act, Section 101(g), 33 U.S.C. Section 125(g).

Federal deference to state water law is so extensive that Congress has waived its sovereign immunity and submitted to adjudication of federal water rights in state court. The McCarran Amendment allows the United States to be joined as a party in state adjudication efforts. 43 U.S.C. § 666.

In summary, "where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." *United States v. New Mexico*, 438 U.S. 696, 702, 98 S. Ct. 3012, 57 L. Ed. 2d 1052, 1058 (1978).

find complete federal pre-emption under § 9659(h) conflicts with this Court's decision in *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 and *Metropolitan Ins. Co. v. Taylor*, 481 U.S. 58 (1987). Petitioner's Brief at 20.

Although Petitioner does not explain how the Ninth Circuit's decision violated this Court's rulings in *Avco* and *Caterpillar*, a review of these cases suggests that the Petitioner's argument is without substance. In order for § 9659(h) to pre-empt state law, its pre-emptive force must be "so 'extraordinary' that it 'converts an ordinary state common law complaint into one stating a federal claim.' " *Caterpillar*, 482 U.S. at 393. Section 9659(h) explicitly preserves all state law causes of action except those time barred by § 9613(h). At most, § 9613(h) simply halts certain categories of potential state claims (*i.e.* challenges and reviews of § 106 Orders by EPA). "[T]he fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted . . . does not establish that they are removable to federal court." *Caterpillar*, 42 U.S. 398.

In *Avco Corp. v. Aero Lodge*, 390 U.S. 557, 20 L. Ed. 2d 126, 88 S. Ct. 1235 (1968), this Court held that "the Labor Management Relations Act expressly furnishes some substantive law" to replace the Tennessee law which formed the basis of the original act. *Avco Corp.* at 558, citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457, 1 L. Ed. 2d 972 at 980, 77 S. Ct. 912. Because § 9613(h) does not provide substantive federal law to replace the state law it purports to pre-empt, complete federal pre-emption does not exist.

Finally, Petitioner argues that the Ninth Circuit's decision conflicts with this Court's ruling in *Metropolitan Life Ins. Co. v. Taylor*. Specifically, Petitioner asserts that there is enough evidence of congressional intent to conclude that § 9613(h) pre-

empts all state law causes of action. In *Taylor*, this Court held that "explicit direction from Congress" was necessary to conclude that complete federal pre-emption exists. 481 U.S. at 63.

The plain language of § 9659(h) evidences congressional intent to *avoid* pre-emption of state law claims, not to replace them with a new body of federal common law.

II.

CHALLENGES UNDER 42 U.S.C. § 9613(h)

1. Petitioner argues that the circuits are divided regarding what claims constitute "challenges to [a] removal or remedial action" under 42 U.S.C. § 9613(h). Petitioner contends that the Ninth and Tenth Circuits require a showing that the proposed action result in a delay of the cleanup before a challenge can be deemed to occur, while the First and Fifth Circuits have articulated a standard which does not require delay.

Congress enacted § 9613(h) to "prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing the EPA's cleanup activities." H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 266 (1985).

Petitioner cites *Reardon v. United States*, 947 F.2d 1509, 1514, (1st Cir. 1991), for the proposition that delay was not a component of the first circuit's challenge analysis under § 9613(h). *Reardon* involved a landowner's effort to remove a lien placed upon his property by the EPA. After deciding that placement of the lien was an enforcement activity within the meaning of CERCLA, the *Reardon* court concluded that challenges "to the merits of particular liens" conflicted with congressional intent "that cleanup of substances that endanger

public health would be delayed if EPA were forced to litigate each detail of its removal and remedial plans before implementing them." 947 F.2d 1513. The *Reardon* decision hinged on a belief that pre-enforcement review, even if it did not specifically ask for a delay, would divert EPA's resources from cleanup to litigation, thereby slowing down the cleanup. The First Circuit's analysis was no different from that of the Ninth Circuit's in this case, and the Tenth Circuit in *United States v. State of Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994). Ultimately, delay is an essential component of the standard by which potential challenges are measured, even if the overt purpose of the action is not to cause delay.

Petitioner next argues that *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380 (5th Cir. 1989) conflicts with decisions of the Ninth and Tenth Circuits because it does not require that delay occur for an underlying action to be a challenge under § 9613(h). The plaintiff in *Voluntary Purchasing* asked for a declaratory judgment regarding its liability for EPA response actions. The action was filed after the EPA sent the plaintiff a number of letters indicating it was liable for cleanup costs. Although a declaratory judgment action would not have directly delayed the cleanup, the court held that such review was prohibited by § 9613(h) because the statute was "designed to preclude piecemeal review and excessive delay of cleanup." 889 F.2d at 1390, citing 132 Cong. Rec. S14928 (daily ed. Oct. 3, 1986). The court concluded that "if PRPs were allowed to file suits for declaratory judgment prior to cost recovery suits being filed by the EPA, much of the EPA's time and resources could end up being allocated to litigation in this area." *Id.* Piecemeal litigation of such lawsuits would distract the EPA from its primary mission, which is to clean up hazardous wastes.

Exhaustion of EPA resources through piecemeal litigation

is not an issue in the instant case because EPA will not be involved in Respondents' state law action against ARCO. The EPA has noted in the instant case that:

> the assertion of state law damages claims against ARCO for its own conduct does not defeat Congressional intent. The protection of water rights does not conflict with the Congressional objective to protect the public health and welfare in the environment through enactment of CERCLA ... if performance of a CERCLA response action requires prevention of injury to water rights, then placing the cost of injury prevention on responsible parties does not conflict with CERCLA.

CR 101 at 18.

Petitioner contends that "had the Ninth Circuit applied the tests of [the First and Fifth Circuits] it would have concluded that respondents' claims 'challenge' the response action EPA has selected." Petitioner's Brief at 23. Petitioner's assertion is untrue. Respondents' surviving claims articulate only state court causes of action, and do not require judicial review of response actions selected by the EPA.

2. Petitioner next argues that certiorari is appropriate because the Ninth Circuit stated that "although determination of whether ARCO's diversions were 'wrongful' . . . may require examination of the EPA's orders, resolution of the damage claim would not involve altering the terms of the cleanup order." Respondents' Appendix A, p. 8a. Petitioner contends that this view conflicts with the second element of § 9613(h) which precludes "review of 'any order issued under § 9606(a)' of this

title." Petitioner's Brief at 13. Petitioner's contention is nothing more than an argument that a federal defense to state law claims creates pre-emption, a notion that has been repeatedly rejected by this court. *Franchise Tax Board,* 463 U.S. at 13; *Merrell Dow,* 478 U.S. at 808.

Even if reference to the EPA's orders is necessary to resolve Respondents' state law claims, such reference is not tantamount to the "review" prohibited by § 9613(h). This Court has previously held that a breach of contract action did not "arise under" § 301 of the Labor Management Relations Act, where resolution of the plaintiffs' claims was "not substantially dependent upon interpretation of [a] collective bargaining agreement." *Caterpillar,* 482 U.S. 386 at 395. Similar results were reached in *Mayor and Council v. Klockner & Klockner,* 811 F. Supp. 1039, 1055 (D.N.J. 1993) where the court concluded that "even if 'review' of the EPA's actions were eventually necessary to determine whether an . . action could proceed against the defendants, this would not be a challenge to the EPA's activities as such, but rather a determination of whether a private action could proceed against the defendants." The Court in *Franchise Tax Board* noted that:

> [E]ven under section 301 of the [LRMA] we have never intimated that an action merely relating to a contract within the coverage of section 301 arises exclusively under that section. For instance, a state battery suit arising out of a violent strike would not arise under section 301 simply because the strike may have been a violation of an employer union contract.

463 U.S. at 29 n. 28.

Under the Petitioners' view of § 9613(h), all state law tort claims would be pre-empted. A plaintiff injured by a negligently operated cement truck delivering concrete to a Superfund site would be obligated to file her complaint in federal court, where it would be summarily dismissed. Such a result was never intended by Congress.

Petitioner argues that Respondents' state law damages claims are a challenge to the cleanup within the meaning of § 9613(h). In its briefing on this issue before the district court, the EPA noted that "compliance with requirements of both CERCLA and state water law is not impossible . . . In fact, ARCO does not claim that compliance with both CERCLA and Montana water law is impossible." CR 101 at 16. The Ninth Circuit found that "ARCO could comply with the [EPA's] order by buying storage water or senior water rights from others." Respondent's Appendix A, p. 8a. The Ninth Circuit's decision is consistent with this Court's ruling that "[S]tate law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 182 (1983), citing in part *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

It is impossible for Respondents' complaint to be a challenge, when the law which forms the basis of the complaint is consistent with the law which EPA has ordered ARCO to obey. Moreover, Petitioner's claim to an impossibility defense requires a factual inquiry,[4] which is not the same as an inquiry into jurisdiction. *Lingle v. Norge*, 486 U.S. 399, 407, 100 L. Ed. 2d 410, 108 S. Ct. 1877, 1883 (1988).

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4. "All the cases involving dismissal under § 113(h) involve actions brought *against the EPA* which the plaintiff sought to enjoin or otherwise challenge a remedy pursued by the EPA." *Mayor and Council v. Klockner & Klockner*, 811 F. Supp. 1039, 1055 (D.N.J. 1993).

3. Petitioner next contends that making it subject to state law claims for compensatory and punitive damages would conflict with this Court's decision in *International Paper Co. v. Oullette*, 479 U.S. 41 (1987). Petitioner's theory is that successful prosecution of such claims would force it to "change its methods of doing business," presumably by putting a halt to its illegal activities. Petitioner's Brief at 24 (citing *Oulette*, 479 U.S. at 495).

The EPA does not agree with this view. In its briefing before the district court in this case, the EPA wrote that congressional requirements,

> to protect the public health and environment do not shield a regulated person from liability under state law intended to achieve different goals.

CR 101 at 17. This issue requires no further discussion.

Petitioner also asserts that *International Paper Co. v. Oullette* enunciates a *per se* ban on compensatory and punitive damages suits against polluters. Petitioner's Brief at 24. *International Paper* involved a lawsuit by Delaware plaintiffs against a New York defendant which was releasing pollution into water that flowed into Delaware. Although, the defendant had previously obtained a discharge permit under New York law, the plaintiffs brought suit in Delaware asserting compensatory and punitive damages claims under Delaware law. This Court held that the Delaware plaintiffs needed to base their compensatory and punitive damages claims on New York law, because the polluter's discharge permit had been issued under New York law. Central to the Court's analysis was a concern about the conflicts inherent in using Delaware law to review a New York discharge permit. "Application of an affected state's law to an out-of-state

source . . . would undermine the important goals of efficiency and predictability in the [New York] permit system." 479 U.S. at 496. Contrary to the Petitioner's assertions, the plaintiffs were not stopped "from bringing a nuisance claim pursuant to the law of the source state" and were allowed to continue their action in Delaware courts. *Id.* at 499. This Court did not hold that compensatory and punitive damages claims should be prohibited because they might force a change in a polluter's conduct.

CONCLUSION

The Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 17, 1995

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS A. BECK; MELVIN R. BECK; ROBERT EVANS, *Plaintiffs-Appellants,* v. ATLANTIC RICHFIELD COMPANY, a Delaware Corporation; and THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS, *Defendants-Appellees.*	No. 94-35487 D.C. No. CV-92-00036-PGH
THOMAS A. BECK; MELVIN R. BECK; ROBERT EVANS, *Plaintiffs-Appellees,* v. ATLANTIC RICHFIELD COMPANY, *Defendant-Appellant.*	No. 94-35551 D.C. No. CV-92-00036-PGH OPINION

Appendix A

WEST SIDE DITCH COMPANY, a Montana Corporation; CITY OF DEER LODGE; RONALD KELLY; JERRY RUTLEDGE; CHARLES BECK; RICHARD FORSON; GEORGE REISTAD, *Plaintiffs-Appellants,* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Intervenor-Appellee,* v. ATLANTIC RICHFIELD COMPANY, a Delaware corporation; MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS, *Defendants-Appellees.*	No. 94-35539 D.C. No. CV-91-00002-PGH
WEST SIDE DITCH COMPANY, a Montana Corporation; CITY OF DEER LODGE; RONALD KELLY; JERRY RUTLEDGE; CHARLES BECK; RICHARD FORSON; GEORGE REISTAD, *Plaintiffs-Appellees,* v. ATLANTIC RICHFIELD COMPANY, a Delaware corporation, *Defendant-Appellant.*	No. 94-35552 D.C. No. CV-91-00002-PGH

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
June 6, 1995—Seattle, Washington

Appendix A

Filed August 17, 1995

Before: James R. Browning, Eugene A. Wright, and Thomas G. Nelson, Circuit Judges.

Per Curiam

SUMMARY

Real Estate/Environmental Law/ Litigation and Procedure (Civil)

The court of appeals vacated a judgment of the district court and remanded with directions to remand to state court. The court held that a downstream water user may bring a damages claim based purely on state law against a corporation that is diverting water from a river pursuant to a federal environmental cleanup order.

The corporate predecessor of appellee Atlantic Richfield Company (ARCO) discharged mining wastes into the Clark River in Montana for many years. The Environmental Protection Agency (EPA) ordered ARCO to clean up the resulting contamination pursuant the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The cleanup required ARCO to divert river water to tailing ponds, where the waste could settle. The cleaner water was released back into the river. The EPA's order specified that ARCO was not to cause any injury to vested water rights, and that the order did not alter any obligation ARCO had to pay for use of the water.

Appellant Thomas Beck and other downstream water users sued ARCO in state court, alleging that the company illegally and negligently appropriated water from the river in derogation of their senior water rights. They sought damages for

crop loss, lost profits, and property devaluation. One downstream user, West Side Ditch Company, also sought injunctive relief. ARCO removed the matter to federal district court and moved to dismiss.

The district court granted the motion, holding that Beck's claim against ARCO for damages constituted a claim against the federal government for inverse condemnation, over which the Court of Federal Claims had exclusive jurisdiction. The district court, alternatively, held that, to the extent Beck alleged that ARCO violated the EPA's order by injuring his water rights, his claim constituted a "challenge" to the cleanup and was, therefore, barred by CERCLA. Beck appealed.

[1] That Beck might have a takings claim against the government for ARCO's diversion of the water in conformity with the EPA's order did not preclude him from bringing a claim based purely on state law for diversion other than in conformity with the order.

[2] Beck's damage claim did not "challenge" the CERCLA cleanup plan and was, thus, unaffected by 42 U.S.C. § 9613(h), which limits such challenges. Although determination of whether ARCO's diversions were "wrongful" may require the district court to examine the EPA's orders, resolution of the damage claim would not involve altering the cleanup order's terms or interfere with ARCO's implementation of the cleanup.

[3] The district court did not have jurisdiction over West Side's claim for injunctive relief because the claim constituted a "challenge" to the CERCLA cleanup plan, over which the court would not have jurisdiction until the cleanup was completed.

Appendix A

COUNSEL

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John P. Davis, Poore, Roth & Robinson, P.C., Butte, Montana, for defendant-appellee ARCO.

Robert L. Klarquist, David C. Shilton, Department of Justice, Washington, D.C., for intervenor-appellee EPA.

OPINION

PER CURIAM:

A group of water users along the Clark Fork River in southeastern Montana[1] appeal the dismissal without prejudice of their claim under Montana law against Atlantic Richfield Company ("ARCO") for compensatory damages for diversion of water from the River. ARCO cross-appeals because the dismissal was without prejudice. We reverse the dismissal and order the district court to remand the case to state court.

I.

ARCO's corporate predecessor discharged mining wastes into the Clark Fork River for many years. The United States Environmental Protection Agency ("EPA") ordered ARCO to clean up the resulting contamination pursuant to the Comprehensive Environmental Response, Compensation, and Liabil-

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[1]The plaintiffs are Thomas A. Beck, Melvin R. Beck, and Robert Evans ("Beck") and West Side Ditch Company, City of Deer Lodge, Ronald Kelly, Jerry Rutledge, Charles Beck, Richard Forson, and George Reistad ("West Side").

ity Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* To implement the cleanup, the EPA ordered ARCO to divert the water into tailing ponds where the waste could settle to the bottom, allowing cleaner water to flow back into the River. The order specified that ARCO was not to cause any injury to vested water rights, and that the order did not alter any obligation ARCO might have to pay for use of the water.[2]

Plaintiffs contend the diversion diminished the amount of water available to downstream users. They filed suit in state court alleging ARCO illegally and negligently appropriated water from the River in derogation of their senior water rights, and seeking compensatory damages for crop loss, lost profits, and property devaluation. West Side also sought an injunction.[3] ARCO removed to federal court and moved to dismiss.

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[2]The order provided:

> To ensure that implementation of the remedy does not cause injury to vested water rights . . . [ARCO] shall comply with all applicable provisions of the laws of the State of Montana . . . before undertaking any remedial action which involves the interception, withdrawal, diversion, storage, capture, possession, or control of any ground water or surface water. Nothing in this Order, however, shall alter any obligation [ARCO] may have under state law to provide compensation or payment for the use of water.

[3]The EPA intervened in the West Side case because the request to enjoin the diversions implicated federal interests under CERCLA, but supported plaintiffs' right to pursue state law damage claims against ARCO. The district court held West Side's request to enjoin the diversions "challenged" the CERCLA cleanup and was therefore barred by the "timing of review" statute, 42 U.S.C. § 9613(h). West Side does not appeal that ruling.

The plaintiffs also named the Montana Department of Fish, Wildlife, and Parks ("the Department") as a defendant based on the Department's alleged diversion of water into wildlife ponds. The district court's order does not mention the Department and the Department did not appear in this appeal.

The district court held plaintiffs' claim against ARCO for damages constituted a claim against the United States for inverse condemnation over which the Court of Federal Claims had exclusive jurisdiction.[4] Alternatively, the district court held that, to the extent plaintiffs alleged ARCO had violated the EPA's order by injuring plaintiffs' water rights, plaintiffs' claim constituted a "challenge" to the cleanup and was therefore barred by CERCLA's "timing of review" provision, 42 U.S.C. § 9613(h).

We conclude from our examination of the complaint that plaintiffs do not assert a claim for inverse condemnation, nor a "challenge" to the cleanup effort. Rather, plaintiffs seek to recover damages under Montana law for violation of their water rights, a claim over which the district court lacks jurisdiction.

II.

[1] Plaintiffs do not allege a takings claim. They expressly allege a cause of action based purely on state law. Even if "[t]he facts stated also [might] have sustained a [takings] claim . . . had [the plaintiffs] elected that remedy, . . . [they] did not do so, and [they] cannot be compelled to do so." *Koratron Co. v. Deering Milliken, Inc.*, 418 F.2d 1314,

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[4]The parties dispute whether the district court dismissed the damage claims for failure to state a claim, which was converted into a summary judgment by the consideration of materials outside the complaint, or for lack of subject matter jurisdiction. We conclude the district court dismissed the damage claims for lack of subject matter jurisdiction. The district court determined the Court of Federal Claims had jurisdiction over the damage claims under the Tucker Act, which is a jurisdictional statute. *United States v. Testan*, 424 U.S. 392, 398 (1976). The court offered to transfer the damage claims to the Court of Federal Claims pursuant to 28 U.S.C. § 1631, which allows a transfer when the "court finds that there is a want of jurisdiction." *See Rowe v. United States*, 633 F.2d 799, 800-02 (9th Cir. 1980) (treating issue of whether complaint should be read as raising a Tucker Act claim as a question of jurisdiction).

1317-18 (9th Cir. 1969).[5] Contrary to the district court's assumption, the fact that plaintiffs might have a takings claim against the United States for diversion of water by ARCO in conformity with the terms of the EPA's order would not in itself preclude plaintiffs from having a state law claim against ARCO for diversion other than in conformity with the EPA's order.[6] *Cf. Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963).

[2] Plaintiffs' damage claim does not "challenge" the CERCLA cleanup plan and is thus unaffected by CERCLA's provision limiting such challenges. 42 U.S.C. § 9613(h). Although determination of whether ARCO's diversions were "wrongful," *Tucker*, 250 P. at 15, may require examination of the EPA's orders,[7] resolution of the damage claim would not involve altering the terms of the cleanup order. If the plaintiffs prevail, the remedy would be financial compensation for

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[5]Our decision is consistent with *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312 (9th Cir. 1989). There, we held "[t]he availability of a Tucker Act remedy [for inverse condemnation] is presumed on a showing that the challenged action was authorized and for a public use." *Id.* at 1317. However, the availability of a Tucker Act remedy is not at issue here; instead, we are called upon to determine whether the plaintiffs alleged such a cause of action.

[6]If it were impossible to divert water into the ponds without injuring the plaintiffs' water rights, we might agree with the district court that the "inescapable conclusion" was that the EPA had authorized ARCO to take those rights. But because the plaintiffs own the right to use a certain amount of water for a beneficial use, not the corpus of the water itself, *Tucker v. Missoula Light & Water Co.*, 250 P. 11, 15 (Mont. 1926), ARCO could comply with the order by buying storage water or senior water rights from others.

We express no opinion on the merits of the plaintiffs' state law claims against ARCO or their potential claims against the United States.

[7]Although ARCO may defend itself by asserting that it acted within the EPA's orders, that is a question of fact, not of jurisdiction. *See Myers*, 323 F.2d at 583; *cf. Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1394-95 (9th Cir. 1988) (plaintiff may avoid federal court by relying exclusively on state law even if defendant asserts a federal defense).

lost crops and lost profits. *Id.* at 18. Such a remedy would not interfere with ARCO's implementation of the cleanup.[8] *Cf. McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 331 (9th Cir. 1995), *petition for cert. filed*, 63 U.S.L.W. 3819 (U.S. May 1, 1995) (No. 94-1807).

[3] Because plaintiffs' damage claim is based entirely on state law, the district court lacks jurisdiction unless it has jurisdiction because of West Side's claim for injunctive relief. Although the district court dismissed this claim, and West Side Ditch does not appeal that dismissal, we consider all of the claims asserted in the complaint to determine whether the district court has jurisdiction. *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991). We conclude that the district court does not have jurisdiction over West Side's claim for injunctive relief because that claim constitutes a "challenge" to the CERCLA cleanup effort over which the district court would not have jurisdiction until the cleanup was completed. 42 U.S.C. § 9613(h); *see McClellan*, 47 F.3d at 328-30.

Because plaintiffs' claims are based solely on state law, and inclusion of the Montana Department of Fish, Wildlife, and Parks as a defendant destroys diversity, 28 U.S.C. § 1332, the district court lacks jurisdiction.[9]

VACATED AND REMANDED WITH DIRECTIONS TO REMAND TO STATE COURT.

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[8]Moreover, a citizen suit under 42 U.S.C. § 9659(a)(1) is not the plaintiffs' sole remedy against ARCO; CERCLA preserves the plaintiffs' right to pursue state law remedies. 42 U.S.C. §§ 9652(d), 9659(h); *see Stanton Road Assoc. v. Lohrey Enter.*, 984 F.2d 1015, 1021-22 (9th Cir. 1993).

[9]Our disposition renders ARCO's cross-appeal moot.

APPENDIX B — COMPLAINT DATED DECEMBER 3, 1990

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Attorneys for Plaintiff

MONTANA THIRD JUDICIAL DISTRICT COURT,
DEER LODGE COUNTY

NO. _____

WEST SIDE DITCH COMPANY, a Montana corporation,

Plaintiff,

-vs-

ATLANTIC RICHFIELD COMPANY, a Delaware corporation, and THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,

Defendants.

COMPLAINT

COMES NOW the Plaintiff, West Side Ditch Company, by and through the undersigned counsel and complains and alleges against Defendants as follows:

Appendix B

I.

Plaintiff, West Side Ditch Company, is a Montana corporation with its principal place of business in Deer Lodge County, Montana.

II.

Defendant, Atlantic Richfield Company, is a Delaware corporation authorized to do business in the State of Montana, and conducts business in Deer Lodge County, Montana.

III.

Defendant, Montana Department of Fish, Wildlife and Parks, is an arm of Montana State Government.

IV.

On June 28, 1889, Plaintiff's predecessor in interest constructed the West Side Ditch tapping the stream and diverting the waters from the Clark Fork of the Columbia River, claiming by Notice of Appropriation, 65 c.f.s. of water for use on Plaintiff's claimed place of use consisting of 3,470 acres located in Sections 5, 7, 8, 16, 17, 18, 19, 20, 21, and 29 of Township 7 North, Range 9 West, and Sections 29 and 32 of Township 8 North, Range 9 West, all in Deer Lodge County, Montana. The point of diversion for this water right is located in the SE 1/4 SE 1/4, Section 20, Township 6 North, Range 9 West, where a headgate and weir supplies what is commonly known as the West Side Ditch.

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V.

On April 21, 1982, Plaintiff filed Claim No. 76G-W-092051 claiming 65 cubic feet per second (c.f.s.) of the waters of the Clark Fork of the Columbia River, also known as the Deer Lodge River.

VI.

The entire flow of Claim No. 76G-W-092051 is necessary to irrigate Plaintiff's claimed place of use. Plaintiff's land will not be productive without irrigation.

VII.

The Clark Fork of the Columbia River flows through tailing ponds controlled by ARCO, located in Sections 19, 30, and 31 of Township 5 North, Range 9 West, and Sections 25 and 36 of Township 5 North, Range 10 West.

VIII.

The Mill-Willow Bypass is a ditch that was constructed prior to 1950 to divert the waters of Mill Creek and Willow Creek in the NE 1/4 of Section 11, Township 4 North, Range 10 West. The Mill-Willow Bypass carries waters from Mill and Willow Creeks around the tailing ponds mentioned in paragraph VII. Water flowing through the Mill-Willow Bypass ultimately contributes substantially to the flows of the Deer Lodge or Clark Fork River.

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IX.

On or about June 1, 1990, the Defendant, or Defendants, and/or their agents, began diverting water from the Mill-Willow Bypass into the tailing ponds described in paragraph VII. The diversion undertaken by the Defendants is upstream of the headgates used by the West Side Ditch Company.

X.

The Defendants' diversion and use of Mill-Willow Bypass water has severely depleted the supply of water in the Clark Fork of the Columbia River at Plaintiff's point of diversion described in paragraph IV above.

XI.

Defendants' diversions from the Mill-Willow Bypass, coupled with construction activities in the area, have substantially altered historic patterns of flow in the Clark Fork of the Columbia River.

XII.

The Defendant ARCO's negligent diversion of water from the stream materially interferes with the Plaintiff's water rights, in that the flow of the Clark Fork of the Columbia River at the Plaintiff's headgate has been severely reduced. Defendants' interference with the Plaintiff's flow of water has occurred continuously since July 1, 1990.

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XIII.

Plaintiff has contacted Defendant ARCO and requested that it stop diversions from the Mill-Willow Bypass. Defendant ARCO deliberately and willfully refused to stop its unlawful diversions of waters flowing into the Mill-Willow Bypass.

XIV.

Due to the decreased flow of the Clark Fork, and resulting depletion of water in the West Side Ditch, Plaintiff, West Side Ditch Company, has experienced significant reduction in crop production upon its claimed place of use described in Paragraph IV above, resulting in crop loss, damages from loss of profits, and expenditures for the replacement of damaged and low yield crops.

XV.

Plaintiffs have repeatedly informed Defendant ARCO that its activities were causing injury to Plaintiffs.

XVI.

The Defendant, Atlantic Richfield Company, is not the owner of any claim for existing water rights from the sources of Silver Bow Creek, Mill Creek, Willow Creek, or the Clark Fork of the Columbia River.

XVII.

Plaintiff's right to use the water of the Clark Fork of the Columbia River and its tributaries, is paramount to any claim of the Defendants.

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XVIII.

Mont. Code Ann. § 85-2-302 (1989) requires that "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefore except by applying for and receiving a permit from the Department [of Natural Resources and Conservation]. The application shall be made on a form prescribed by the Department."

XIX.

As of September 28, 1990, Defendant ARCO had not applied for a permit from the Montana Department of Natural Resources and Conservation for usage of the waters of Mill Creek, Willow Creek, or Silver Bow Creek.

XX.

Mont. Code Ann. § 85-2-402 (1989) states "an appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the Department [of Natural Resources and Conservation] or if applicable of the Legislature."

XXI.

Defendant ARCO has not applied for a change in appropriation right from the Montana Department of Natural Resources and Conservation as of September 28, 1990.

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XXII.

Defendants' impoundment of surface waters from the Mill-Willow Bypass results in less water being available for Plaintiff's diversion described in Paragraph IV above.

XXIII.

Mont. Code Ann. § 85-2-406(2) authorizes the petition for relief in district court of any person whose rights are affected by a controversy over the distribution of water from a source in which existing rights have not been determined .

Plaintiff has no adequate remedy at law;

WHEREFORE, Plaintiff prays:

1. Plaintiff's right to the waters described in its claims be declared paramount to any claims of the Defendants.

2. Defendants ARCO and the Montana Department of Fish, Wildlife and Parks be enjoined from diverting the waters of the Mill-Willow Bypass or engaging in any activity which interferes with Plaintiff's right to waters of the Clark Fork of the Columbia River.

3. That Defendants ARCO and the Montana Department of Fish, Wildlife and Parks be required to release all waters illegally impounded and stored by its dams or diversions.

4. For Plaintiff's costs of suit in this action and reasonable attorney fees .

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5. For damages from Defendant ARCO arising from crop loss sustained as a result of Defendants' improper and unlawful diversion and depletion of the waters of Silver Bow, Mill, and Willow Creeks and the Deer Lodge River.

6. For such further relief as the Court may deem proper and just.

DATED this 3 day of December, 1990.

MOORE, O'CONNELL, REFLING
& MANOS

BY: s/ Russ McElyea
RUSS McELYEA

APPENDIX C — AMENDED COMPLAINT DATED MAY 24, 1991

RUSS McELYEA
Moore, O'Connell, Refling & Manos
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P. O . Box 1288
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(406) 587-5511
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

NO. CV-91-2-BU-PGH

WEST SIDE DITCH COMPANY, a Montana corporation, CITY OF DEER LODGE, RONALD KELLY, JERRY RUTLEDGE CHARLES BECK, RICHARD FORSON, GEORGE REISTAD, and NATIONAL PARK SERVICE

Plaintiffs,

-vs-

ATLANTIC RICHFIELD COMPANY, a Delaware corporation, and THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,

Defendants .

AMENDED COMPLAINT

COMES NOW the Plaintiff, West Side Ditch Company, by and through the undersigned counsel and complains and alleges against Defendants as follows:

Appendix C

I.

Plaintiff, West Side Ditch Company, is a Montana corporation with its principal place of business in Deer Lodge County, Montana. The City of Deer Lodge, Ronald Kelly, Jerry Rutledge, Charles Beck, Richard Forson, George Reistad, and the National Park Service, operators of the Grant Kohrs National Historic Site are shareholders in the West Side Ditch Company.

II.

Defendant, Atlantic Richfield Company, (ARCO) is a Delaware corporation authorized to do business in the State of Montana, and conducts business in Deer Lodge County, Montana.

III.

Defendant, Montana Department of Fish, Wildlife and Parks, is an arm of Montana State Government.

IV.

On June 28, 1889, Plaintiff's predecessor in interest constructed the West Side Ditch tapping the stream and diverting the waters from the Clark Fork of the Columbia River, claiming by Notice of Appropriation, 65 c.f.s. of water for use on Plaintiff's claimed place of use consisting of 3,470 acres located in Sections 5, 7, 8, 16, 17, 18, 19, 20, 21, and 29 of Township 7 North, Range 9 West, and Sections 29 and 32 of Township 8 North, Range 9 West, all in Deer Lodge County, Montana. The point of diversion for this water right is located in the SE 1/4 SE 1/4, Section 20, Township 6 North, Range 9 West, where a

headgate and weir supplies what is commonly known as the West Side Ditch.

V.

On April 21, 1982, Plaintiff West Side Ditch Company filed Claim No. 76G-W-092051 with the Montana Department of Natural Resources and Conservation claiming 65 cubic feet per second (c.f.s.) of the waters of the Clark Fork of the Columbia River, also known as the Deer Lodge River.

VI.

The entire flow of Claim No. 76G-W-092051 is necessary to irrigate the Plaintiff's claimed places of use. Plaintiff's land will not be productive without irrigation.

VII.

The Clark Fork of the Columbia River flows through tailing ponds controlled by ARCO and wildlife ponds controlled by Fish, Wildlife and Parks, located in Sections 19, 30, and 31 of Township 5 North, Range 9 West, and Sections 25 and 36 of Township 5 North, Range 10 West.

VIII.

The Mill-Willow Bypass is a ditch that was constructed prior to 1950 to divert the waters of Mill Creek and Willow Creek in the NE 1/4 of Section 11, Township 4 North, Range 10 West. The Mill-Willow Bypass carries waters from Mill and Willow Creeks around the ponds mentioned in paragraph VII. Water flowing through the Mill-Willow Bypass ultimately contributes substantially to the flows of the Deer Lodge or Clark Fork River.

Appendix C

IX.

On or about June 1, 1990, the Defendant, or Defendants, and/or their agents, began diverting water from the Mill-Willow Bypass into the tailing ponds described in paragraph VII . The diversion undertaken by the Defendants is upstream from the headgates used by the West Side Ditch Company. Defendant ARCO or its predecessors have also diverted the waters of Silver Bow Creek into the ponds identified by paragraph VII .

X.

The Defendants' diversion and use of the Mill-Willow Bypass, Silver Bow Creek, Mill Creek, Willow Creek, and other sources has severely depleted the supply of water in the Clark Fork of the Columbia River at Plaintiff's point of diversion described in paragraph IV above.

XI.

Defendants' diversions, coupled with their construction activities in the area, have substantially altered historic patterns of flow in the Clark Fork of the Columbia River.

XII.

The Defendant's negligent diversion of water from streams in the Deer Lodge River Basin materially interferes with the Plaintiff's water rights, in that the flow of the Clark Fork of the Columbia River at the Plaintiff's headgate has been severely reduced.

Appendix C

XIII.

Plaintiffs have contacted Defendant ARCO and requested that it stop diversions from the Mill-Willow Bypass. Defendant ARCO deliberately and willfully refused to stop its unlawful diversions of waters flowing into the Mill-Willow Bypass.

XIV.

Due to the decreased flow of the Clark Fork, and resulting depletion of water in the West Side Ditch, the Plaintiffs have experienced significant reduction in crop production upon their properties described in Paragraph IV above, resulting in crop loss, damages from loss of profits, and expenditures for the replacement of damaged and low yield crops. In addition, shareholders in the West Side Ditch Company have experienced a decrease in the value of their shares in the West Side Ditch Company, and have seen a consequent decline in the value of both their shares and their real property as a result of the Defendant's actions.

XV.

Plaintiffs have repeatedly informed Defendant ARCO that its activities were causing injury to Plaintiffs.

XVI.

The Defendant, Atlantic Richfield Company, is not the owner of any claim for existing water rights from the sources of Silver Bow Creek, Mill Creek, Willow Creek, or the Clark Fork of the Columbia River.

Appendix C

XVII.

Plaintiff's right to use the water of the Clark Fork of the Columbia River and its tributaries, is paramount to any claim of the Defendants.

XVIII.

Mont. Code Ann. § 85-2-302 (1989) requires that "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefore except by applying for and receiving a permit from the Department [of Natural Resources and Conservation]. The application shall be made on a form prescribed by the Department."

XIX.

As of September 28, 1990, Defendant ARCO had not applied for a permit from the Montana Department of Natural Resources and Conservation for usage of the waters of Mill Creek, Willow Creek, or Silver Bow Creek.

XX.

Mont. Code Ann. § 85-2-402 (1989) states "an appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the Department [of Natural Resources and Conservation] or if applicable of the Legislature."

Appendix C

XXI.

Defendant ARCO has not applied for a change in appropriation right from the Montana Department of Natural Resources and Conservation as of September 28, 1990.

XXII.

Defendants' impoundment of surface waters from the Mill-Willow Bypass, Silver Bow Creek, Mill Creek, Willow Creek, and other sources in the Deer Lodge River Basin results in less water being available for Plaintiff's diversion described in Paragraph IV above.

XXIII.

Mont. Code Ann. § 85-2-406(2) authorizes the petition for relief in district court of any person whose rights are affected by a controversy over the distribution of water from a source in which existing rights have not been determined.

Plaintiff has no adequate remedy at law;

WHEREFORE, Plaintiffs pray:

1. Plaintiff's right to the waters described in its claims be declared paramount to any claims of the Defendants.

2. Defendants ARCO and the Montana Department of Fish, Wildlife and Parks be en joined from diverting, impounding, withdrawing, or using for any purpose waters from any stream or tributary in the Clark Fork Basin upstream of the Plaintiffs' point of diversion for which Defendants do not have water rights or

engaging in any activity which interferes with Plaintiff's right to waters of the Clark Fork of the Columbia River.

3. That Defendants ARCO and the Montana Department of Fish, Wildlife and Parks be required to release all waters illegally impounded and stored by its dams or diversions.

4. For Plaintiff's costs of suit in this action and reasonable attorney fees.

5. For damages from Defendant ARCO arising from crop loss, property devaluation and other damages sustained as a result of Defendants' improper and unlawful diversion and depletion of the waters of Silver Bow, Mill, and Willow Creeks and other sources in the Deer Lodge Basin.

6. For punitive damages arising from Defendant ARCO's willful, wanton, and reckless disregard for the rights and interests of the Plaintiffs.

7. For such further relief as the Court may deem proper and just.

DATED this 24 day of May, 1991.

MOORE, O'CONNELL, REFLING
& MANOS

BY: /s/
RUSS McELYEA

APPENDIX D — COMPLAINT DATED APRIL 29, 1992

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Attorney for Plaintiffs
THOMAS A. BECK, MELVIN R. BECK and ROBERT EVANS

IN THE THIRD JUDICIAL DISTRICT COURT
FOR THE STATE OF MONTANA, POWELL COUNTY

Cause No. CV-92-51

THOMAS A. BECK, MELVIN R. BECK and ROBERT EVANS,

Plaintiffs,

v

ATLANTIC RICHFIELD COMPANY, a Delaware corporation, and THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,

Defendants.

COMPLAINT

COMES NOW the above-named Plaintiffs, Thomas A. Beck, Melvin R. Beck and Robert Evans, by and through the undersigned counsel and complains and alleges against the above-named Defendants as follows:

Appendix D

GENERAL ALLEGATIONS

1. Plaintiffs are and at all times relevant to this complaint, were residents of Deer Lodge, Montana.

2. Defendant, Atlantic Richfield Company, (ARCO) is a Delaware corporation authorized to do business in the State of Montana, and conducts business in Deer Lodge County and Powell County, Montana.

3. Defendant, Montana Department of Fish, Wildlife and Parks (DFWP), is an agency of Montana State Government located in Helena, Montana.

4. Plaintiffs' and their predecessors in interest have appropriated and utilized the waters from the Clark Fork River, for irrigation purposes. The Plaintiffs have beneficially used the waters of the Clark Fork River in Section 29, Township 07 North, Range 09 West, and Section 32 of Township 07 North, Range 09 West, all in Powell County, Montana. The point of diversion for this water right is located in the SW 1/4 SE 1/4 NW 1/4 Sec. 33, Township 07 North, Range 09 West.

5. On December 18, 1981, Plaintiffs or their predecessors in interest filed Claim No. 76G-W-100077-00 with the Montana Department of Natural Resources and Conservation claiming 15.00 c.f.s. of the waters of the Clark Fork River, also known as the Deer Lodge River. The 15.00 c.f.s. has been historically utilized by the Plaintiffs and their predecessors for irrigation purposes since September 28, 1966.

6. The entire flow of Claim No. 76G-W-100077-00 is necessary to adequately irrigate the Plaintiffs' claimed places of use. Plaintiffs' land will not be productive without irrigation.

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7. The Clark Fork River flows in the vicinity of certain tailings ponds controlled by ARCO and wildlife ponds controlled by Fish, Wildlife and Parks, located in Sections 19, 30, and 31 of Township 5 North, Range 9 West, and Sections 25 and 36 of Township 5 North, Range 10 West.

8. The Mill-Willow Bypass is a ditch that was constructed prior to 1950 to divert the waters of Mill Creek and Willow Creek in the NE 1/4 of Section 11, Township 4 North, Range 10 West. The Mill-Willow Bypass carries waters from Mill and Willow Creeks, tributaries of the Clark Fork River, around the ponds mentioned in Paragraph 7. Water flowing through the Mill-Willow Bypass ultimately contributes substantially to the flows of the Deer Lodge or Clark Fork River.

9. On or about June 1, 1990, the Defendants, and/or their agents began diverting water from Mill-Willow Bypass into the tailing ponds described in Paragraph 7. The diversion undertaken by the Defendants is upstream from the diversion used by the Plaintiffs. Defendant ARCO, or its agents, have also diverted the waters of Silver Bow Creek into the ponds identified by Paragraph 7.

10. The Defendants, ARCO and DFWP are not the owners of any claim for existing water rights from the sources of Silver Bow Creek, Mill Creek, Willow Creek, or the Clark Fork River.

11. The Defendants ARCO and DFWP have not applied for a water rights permit from the Montana Department of Natural Resources and Conservation (DNRC) for usage of the waters of Mill Creek, Willow Creek, Silver Bow Creek, or the Clark Fork River. Likewise, the Defendants ARCO and DFWP have not received a water rights permit from the DNRC to divert any waters of said sources.

12. Defendants ARCO and DFWP have not applied for a change in appropriation right with the Montana Department of Natural Resources and Conservation (DNRC). Likewise, no change in any appropriation right has been approved by the DNRC.

COUNT I

13. Plaintiffs reallege each and every one of the allegations contained in the preceding paragraphs.

14. The Defendants' illegal diversions and use of the Mill-Willow Bypass, Silver Bow Creek, Mill Creek, Willow Creek, and other sources contrary to Montana law, have severely depleted the supply of water in the Clark Fork River at Plaintiffs' point of diversion described in Paragraph 4 above.

15. Defendants' illegal diversions in the area have substantially altered historic patterns of flow in the Clark Fork River. As a result of said illegal diversions, the Plaintiffs have been deprived of water available at Plaintiffs' point of diversion described in Paragraph 4 above.

16. The Defendants' diversion of water from streams in the Clark Fork Basin materially and substantially interferes with the Plaintiffs' water rights, in that the flow of the Clark Fork River at the Plaintiffs' points of diversion have been severely reduced and depleted.

17. Due to the decreased flow of the Clark Fork, and resulting depletion of water available at their diversion points, the Plaintiffs have experienced significant reduction in crop production upon their properties described in Paragraph 4 above,

resulting in crop loss, damages from loss of profits, and expenditures for the replacement of damaged and low yield crops. In addition, the Plaintiffs have experienced a decrease in the value of their real property as a result of the Defendants' actions.

18. As a result of Defendants' illegal use of water from streams in the Clark Fork River Basin, the Plaintiffs have suffered damages.

COUNT II

19. Plaintiffs reallege each and every one of the allegations contained in the preceding paragraphs.

20. The Defendants' negligent diversions and use of the Mill-Willow Bypass, Silver Bow Creek, Mill Creek, Willow Creek, and other sources contrary to Montana law, have severely depleted the supply of water in the Clark Fork River at Plaintiffs' point of diversion described in Paragraph 4 above.

21. Defendants' negligent diversions in the area have substantially altered historic patterns of flow in the Clark Fork River. As a result of said negligent diversions, the Plaintiffs have been deprived of water available at Plaintiffs' point of diversion described in Paragraph 4 above.

22. The Defendants' negligent diversion of water from streams in the Clark Fork Basin materially and substantially interferes with the Plaintiffs' water rights, in that the flow of the Clark Fork River at the Plaintiffs' points of diversion have been severely reduced and depleted.

Appendix D

23. Due to the decreased flow of the Clark Fork, and resulting depletion of water available at their diversion points, the Plaintiffs have experienced significant reduction in crop production upon their properties described in Paragraph 4 above, resulting in crop loss, damages from loss of profits, and expenditures for the replacement of damaged and low yield crops. In addition, the Plaintiffs have experienced a decrease in the value of their real property as a result of the Defendants' negligent actions.

24. As a result of Defendants' negligent use of water from streams in the Clark Fork River Basin, the Plaintiffs have suffered damages .

COUNT III

25. Plaintiffs reallege each and every one of the allegations contained in the preceding paragraphs.

26. Defendant ARCO has been repeatedly contacted and requested that it stop diversions from the Mill-Willow Bypass. Defendant ARCO deliberately and willfully refused to stop its unlawful diversions of waters flowing into the Mill-Willow Bypass.

27. Defendant ARCO has been repeatedly informed that its activities were causing injury to water users on the Clark Fork River.

28. Despite the above-mentioned efforts, the Defendants have continued to illegally divert the surface waters from the Mill-Willow Bypass, Silver Bow Creek, Mill Creek, Willow Creek, and other sources in the Clark Fork River Basin which has

resulted in less water being available for Plaintiffs' diversion described in Paragraph 4 above.

29. As a result of the Defendants wanton, willful and reckless conduct in illegally diverting waters in the Clark Fork River Basin, the Plaintiffs have been injured and Plaintiffs are entitled to punitive damages.

COUNT IV

30. Plaintiffs reallege each and every one of the allegations contained in the preceding paragraphs.

31. Plaintiffs' right to use the water of the Clark Fork River and its tributaries is superior to any claimed use by the Defendants.

32. Montana law authorizes this action for relief in district court of any person whose rights are affected by a controversy over the distribution of water, and state law authorizes damages for the allegations contained in this complaint.

WHEREFORE, Plaintiffs pray for relief as follows:

1. For monetary damages from Defendants ARCO and DFWP arising from crop loss, property devaluation and other damages sustained as a result of Defendants' illegal, negligent and unlawful diversion and repletion of waters of Silver Bow, Mill, and Willow Creeks and other sources in the Clark Fork River Basin. Such damages shall be shown and determined at trial.

2. For punitive damages arising from Defendants' willful, wanton, and reckless disregard for the rights and interest of the Plaintiffs.

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3. For Plaintiffs' costs of suit in this action and reasonable attorney's fees.

4. For such further relief as the Court may deem proper and just.

Dated this 29th day of April, 1992.

By s/ John E. Bloomquist
John E. Bloomquist, Esq.
Attorney for Plaintiffs
Thomas Beck, Melvin Beck and Robert Evans

Plaintiffs hereby demand a jury trial to try the cause.

By s/ John E. Bloomquist
John E. Bloomquist, Esq.
Attorney for Plaintiffs
Thomas Beck, Melvin Beck and Robert Evans

APPENDIX E — RELEVANT STATUTES

42 U.S.C.A. § 9613 (1995) Civil proceedings

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

42 U.S.C.A. § 9659 (1995) Citizens suits

(a) Authority to bring civil actions

Except as provided in subsections (d) and (e) of this section and in section 9613(h) of this title (relating to timing of judicial review), any person may commence a civil action on his own behalf —

> (1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities); . . . .

(h) Other rights

This chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 9613(h) of

this title or as otherwise provided in section 9658 of this title (relating to actions under State law).